

Report of the Colorado Commission on Judicial
Discipline to the Interim Committee on Judicial
Discipline of the Colorado General Assembly

June 14, 2022 Initial Hearing

PURPOSE OF JUDICIAL ETHICS OVERSIGHT

The Center for Judicial Ethics was created by the National Center for State Courts as the leading source of information for judicial conduct commissions and about commissions. The Center for Judicial Ethics has explained the purpose of the conduct commissions as follows:

Every state has a judicial discipline system that reviews, investigates, prosecutes, and adjudicates complaints about judges. The primary purpose of these systems is not to punish judges but to maintain and restore public confidence in the integrity, independence, and impartiality of judges and the judicial system by:

- Enforcing rigorous standards of judicial conduct on and off the bench,
- Reassuring the public that the judiciary does not tolerate or condone judicial misconduct but recognizes and condemns it,
- Deterring further misconduct by the respondent judge,
- Deterring similar misconduct by other judges,
- Impressing upon judges the significance of misconduct,
- Making the public aware of what constitutes proper and improper judicial conduct,
- Protecting judges from false or unfounded accusations, and
- Maintaining the necessary balance between accountability and judicial independence.

To accomplish those goals, judicial conduct commissions:

- Assist judges who have committed minor ethical violations change their behavior,
- Impose or recommend a public sanction when warranted, and
- Secure the removal of a judge from office when necessary.

Handbook for Members of Judicial Conduct Commissions at 4.

Colorado's own Institute for the Advancement of the American Legal System ("IAALS") has explained the history and role of judicial conduct commissions as follows:

Until the 1960s, the formal methods for addressing allegations of state judges' misconduct, such as legislative impeachment or recall elections, were cumbersome and time-consuming. These shortcomings were highlighted when scandals rocked several state judiciaries,¹ revealing a need for more efficient disciplinary procedures. Starting in 1960, California and eventually all states established variously named bodies (this Report uses the generic term "commission") to investigate allegations of judicial misconduct or disability and—where appropriate—prosecute, adjudicate, and either recommend discipline to the state's highest court or impose it, subject to appellate review.²

Effective judicial discipline is an important part of a trusted and trustworthy court system. The public must know that judicial ethics and violations of the Code of Judicial Conduct are taken seriously. Absent that assurance, the system appears self-serving, protectionist, and even potentially corrupt. And it is not just the reality of the existence of effective systems that matters; it is also the appearance. A wholly effective system with no transparency and no public confidence will not suffice.

Recommendations for Judicial Discipline Systems at 1, IAALS (July 2018).

The director of the Center for Judicial Ethics, Cynthia Gray, has further explained,

To maintain and restore public confidence in the integrity, independence, and impartiality of their judiciary, each of the fifty states, beginning with California in 1960, has established a judicial conduct organization charged with investigating and prosecuting complaints against judicial officers. Although punishment plays an “undeniable role” in judicial discipline (*Johnstone*, 2000, at 1234), protecting the public, not sanctioning judges, is the primary purpose of the judicial conduct commissions.

One way to protect the public is to remove the offending judge from office. . . . [A]nother way to protect the public is to keep it informed of judicial transgressions and their consequences, so that it knows that its government actively investigates allegations of judicial misconduct and takes appropriate action when these allegations are proved. Judicial discipline thus protects the public by fostering public confidence in the integrity of a self-policing judicial system (*Johnstone*, at 1234).

In addition, sanctions deter further misconduct by the disciplined judge and other judges.

Gray, Cynthia, *How Judicial Conduct Commission Work*, 28 *Justice System Journal* 3 (2007).

The Colorado Supreme Court has adopted the following descriptions of the role of the Colorado Commission on Judicial Discipline (the “Discipline Commission”):

The [Discipline] Commission is responsible for maintaining the integrity and independence of the judiciary.¹

...

The Constitutional mandate of the [Discipline] Commission is to protect the public from improper conduct of judges; preserve the integrity of the judicial process; maintain public confidence in the judiciary; create greater awareness of proper judicial behavior on the part of the judiciary and the public; and provide for the fair and expeditious disposition of complaints of judicial misconduct or judicial disabilities.²

Credible systems for the oversight of judicial ethics allow the judicial branch of government to maintain its special position of trust in our society so that it may maintain decisional independence. Without a credible system that ensures ethical behavior by judges, we run a high risk of losing the benefits of a judiciary whose decisions are insulated from popular politics, a judiciary where all stand equal before the law with cases decided on merit rather than influence.

COLORADO'S ADOPTION OF A JUDICIAL DISCIPLINE COMMISSION

In the middle of the 20th Century, Colorado had a highly politicized judicial system that relied on partisan elections to select judges. The system had frequent problems with incompetent, corrupt, and biased judges. In 1962, the Colorado General Assembly referred a constitutional amendment to reform the structure of Colorado's judiciary to the voters. The measure passed with an overwhelming majority.

In 1966, the League of Women Voters used Colorado's initiative process to present a further amendment to Colorado voters. With this amendment, Colorado would adopt a merit selection system for selecting judges (commonly called the "Missouri Plan") and for overseeing judges. This proposal was known as "Amendment 3." The voters of Colorado adopted Amendment 3 through the initiative process.

As part of court reform, Amendment 3 created the Colorado Commission on Judicial Discipline (the "Discipline Commission"). Under the thinking of the era, Amendment 3's design for oversight of judicial ethics was progressive. Instead of leaving judicial ethics wholly to the judiciary for opaque self-policing, Amendment 3 created an independent Discipline Commission. The Discipline Commission was created to have multiple perspectives and voices in overseeing judicial ethics, with representatives of the judiciary, the bar, and non-lawyer citizens. As a further check, Amendment 3 diversified the appointment authority for commission membership. Before that era, judicial ethics was usually left exclusively to judges with no outside oversight and little accountability other than the election of judges.

Once adopted, Amendment 3 became Article VI, § 23(3) of the Colorado Constitution. It has remained essentially unchanged for 65 years.

¹ Colorado Rules of Judicial Discipline, Rule 3.5(a).

² Colorado Rules of Judicial Discipline, Rule 1(b) (emphasis added).

SCOPE OF AUTHORITY OF COLORADO'S DISCIPLINE COMMISSION

The Discipline Commission's general authority and function are defined by Article VI, § 23 of the Colorado Constitution. The Discipline Commission has authority over justices and judges "of any court of record of this state." This has been interpreted to mean:

- Judges of the county court,
- Judges of the district court,
- Judges of the court of appeals, and
- Justices of the state supreme court.

The Discipline Commission does not have authority over federal judges sitting in Colorado, magistrate judges, municipal court judges, or non-judge personnel of the Colorado Judicial Department.

Colorado's Discipline Commission is to take actions within its powers regarding a judge or justice for:

- Willful misconduct in office,
- Willful or persistent failure(s) to perform duties,
- Intemperance, and
- Violation(s) of the Colorado Code of Judicial Conduct.

Within the context of its disciplinary powers,³ the Discipline Commission is further authorized to:

- Conduct investigations,
- Order informal remedial action,
- Order a formal hearing before the Discipline Commission,
- Call for appointment of a panel of three special masters (who must be qualified judges or justices) to hold a hearing and issue a report to the Discipline Commission, or
- Recommend public discipline to the Colorado Supreme Court.

The Discipline Commission has direct authority to impose *private* discipline on a judge. However, with respect to *public* discipline, the Discipline Commission only has authority to make recommendations to the Colorado Supreme Court. Under the current system, only the justices of the Colorado Supreme Court have authority to impose *public* discipline on a justice or judge such as a public censure or removal from office.

The Colorado Constitution makes no provision for deciding judicial discipline cases when the members of the Colorado Supreme Court have conflicts of interest that would otherwise disqualify them for sitting on the case under the Colorado Code of Judicial Conduct.

³ The Discipline Commission also has authority to take action in cases of judicial disability. The Discipline Commission's role in disability proceedings is not further discussed in this report as it is not central to the current discussion.

THE CASELOAD—ALLEGATIONS, JUDGES, AND VICTIMS

Pursuant to the Colorado Rules of Judicial Discipline (“Colo. RJD”), the Discipline Commission publishes an annual report with a detailed breakdown of the caseload it handles. These annual reports can be reviewed at http://www.coloradojudicialdiscipline.com/Annual_reports.html

The Discipline Commission receives allegations of misconduct by judges and requests to investigate possible misconduct. The Colo. RJD refer to these collectively as “Requests for Evaluation” or “RFEs.” The Discipline Commission receives approximately 200⁴ written RFEs alleging judicial misconduct per year.

A large majority of the allegations of misconduct received by the Discipline Commission are facially invalid. The largest portion of the allegations are simply complaints of disagreement with a ruling entered by a judge filed by a disgruntled litigant. The Discipline Commission does not act as an appellate court. The Discipline Commission also receives a large number of allegations of misconduct against professionals outside its authority, such as federal judges, magistrate judges, judicial administrative personnel, and personnel from other branches of government.

Over 90% of the allegations of misconduct received by the Discipline Commission are outside of the Commission’s jurisdiction or don’t meet the criteria for further action and do not progress beyond the initial “evaluation” stage, the initial screening stage assigned to the Discipline Commission. This ratio is consistent with judicial conduct commissions across the United States.

Of the misconduct allegations received by the Discipline Commission annually, approximately 70 require the Commission to undertake factual investigation, to develop a factual record through gathering and reviewing evidence.

In many cases that involve actual misconduct, the judge acknowledges error and the discipline matter is resolved by agreement. In the majority of cases involving actual misconduct, the judge’s misconduct can be addressed and corrected, often through private discipline. In the most serious cases, the discipline will be public discipline.

In the most serious cases when an agreement cannot be reached between the responding judge and the Discipline Commission, the Commission files “formal proceedings.” For the understanding of most people, this is essentially a trial.

As of the date of this writing, Colorado has had 6 instances of public discipline since 2014. Half of these cases have involved male judges, half have involved female judges. Five of the six have involved judges that were understood to be members of the racial/ethnic majority.

⁴ The RFE’s for 2022 are currently on a pace to increase by approximately 25% to the 250 level.

Public Discipline Cases				
	Judges Disciplined (6) ¹		Known Individual Recipients of Misconduct (14) ²	
	Number	Percent	Number	Percent
Male	3	50%	1	7%
Female	3	50%	13	93%
White	5	83%	11 (3)	78%
BIPOC	1 (4)	7%	3	12%
¹ 2014 to Present				
² Litigants, attorneys, other groups affected cannot be quantified and are excluded, only a person that was the individual target of the misconduct is included.				
³ Listed as white if race/ethnicity not known.				
⁴ Discipline process was after Judge had already resigned facing criminal proceedings.				

Cases involving public discipline are more likely than other cases to involve judicial misconduct that has one or more victims. The six cases of public discipline involved charges of misconduct victimizing 14 individuals.⁵ The victims of this judicial misconduct were overwhelmingly female at 93%. Approximately 12% of these individual victims were known to be diverse members of the community and that diversity was related to the misconduct.⁶ Most of these victims worked within the Judicial Department. Some were judge colleagues/peers of the responding judge, but most were non-judge personnel and at a lower level in the power structure.

Victims of serious judicial misconduct have described their experiences as follows:

- From different victims: **Terrified, threatened, tears, appalled, angry, shocked, uncomfortable, nauseated, scared, in a daze, humiliating incident, hoped would never resurface**
- **Afraid I would get fired if I told administration about this**
- **I can't risk angering him, my clients are in precarious positions**
- **The judge might retaliate, and I felt my job was on the line**
- **I wanted to get out of the division**
- **I did not want to report to administration**
- **I was sweating, nervous, terrified, wanted to get out**
- **Scared to death I might get fired, then angry**
- **I did not want to tell anyone, just wait for a transfer**
- **A stab through my heart each time**

⁵ After discipline of a judge is made public the Discipline Commission will often receive reports of other instances of misconduct involving other victims. The figures reported here are limited to the victims involved in the charged conduct. Later identified misconduct and victims are not included in these figures as these alleged instances were not litigated in these cases.

⁶ The reported figures are limited to individually involved victims and do not attempt to quantify those adversely affected by misconduct involving groups, whether groups of litigants or segments of society.

- **I had to put up with it, I could not hurt my clients**
- **I was uncomfortable appearing in front of him**
- **I was horrified by being told [xxx] by someone I trusted as a professional mentor.**
- **Removed me from the equation altogether, erased my agency, ignored the power dynamics at play, convinced myself that reporting would prove futile**

HOW DOES THE DISCIPLINE PROCESS WORK?

If one is familiar with the literature in judicial ethics, Colorado has a “two-tiered unified system.” Colorado’s system is “unified” rather than “bifurcated” because both the investigative and the adjudicative functions are combined in the Discipline Commission. The system is “two-tiered” because the Colorado Supreme Court, rather than the Discipline Commission, holds the authority to make the final discipline decisions and make final determinations of fact. This is not an uncommon mid-twentieth century model.

In Colorado, as in many states, the Discipline Commission acts largely as a form of grand jury. In general terms for the most typical serious cases, the Discipline Commission receives the allegation of misconduct, screens it, develops evidence, decides if a formal complaint should be opened, gets the position of the responding judge to the allegations, reviews more evidence, decides if the case should go to trial, and, after trial, recommends a sanction to the Colorado Supreme Court. The Colorado Supreme Court then reviews the record of prior proceedings, decides if further evidentiary hearings should be conducted, hears arguments, and decides whether a sanction should be imposed and, if imposed, what that sanction should be.

The Discipline Commission breaks this process down into 5 phases.





Intake and Screening In this initial phase, the Discipline Commission receives the allegation of judicial misconduct, the RFE. Under Colo. RJD 13, it performs a screening process. This process is designed, in part, to dispense with facially invalid and frivolous complaints as quickly as possible. If an allegation of misconduct is dismissed at this stage, the judge at issue is not even told of the allegation to avoid unnecessarily creating potential conflicts of interest.

The Discipline Commission is directed that it “shall” dismiss an allegation of misconduct at this stage immediately if the allegation has no “reasonable basis.” Colo. RJD 13(c).



Complaint Investigation If, and only if, an allegation of judicial misconduct is found to have a “reasonable basis,” the Discipline Commission is authorized to characterize the allegation as a “complaint” under Colo. RJD 14. This decision, in turn, triggers the formal “investigation” of the allegation by the Commission (as opposed to the “evaluation” of an allegation in the Intake and Screening phase). This Complaint Investigation is the second phase of Colorado’s judicial discipline process.

The Discipline Commission sends to the accused judge a formal notice of the allegations and decision to investigate under Colo. RJD 14(a). The Discipline Commission also pursues its investigation of the allegations, sometimes through the use of professional investigators and sometimes involving an attorney⁷ for assistance known as “special counsel.” The Discipline Commission has the authority to recommend to the Supreme Court an immediate temporary suspension of the judge at this phase or pursue expedited proceedings when circumstances warrant.

As suggested, the Discipline Commission’s primary role during the Complaint Investigation phase is to investigate the facts and gather evidence. While Colo. RJD 22 provides the Discipline Commission with subpoena power (again, much like a grand jury), the Colorado Judiciary has recently taken the position that the Discipline Commission does not hold subpoena power or any other fact gathering authority at this phase. Instead, the Colorado Judiciary has recently begun asserting that the Discipline Commission holds no authority to compel production of evidence.⁸

A case may advance out of this investigative phase and into the third phase if and only if the Discipline Commission finds that the available evidence proves the misconduct by a “preponderance of the evidence.” This is the familiar burden of proof applied by juries in civil trials such as personal injury cases and contract disputes.

⁷ Traditionally, these personnel have been provided by the Supreme Court’s Office of Attorney Regulation Counsel.

⁸ The Colorado Judiciary has only recently asserted that the subpoena power under the rules arises only after formal proceedings have been filed. Separately, the Colorado Judiciary has asserted that the Discipline Commission is not a party to the formal proceedings. Thus, whether they acknowledge that the Discipline Commission ever holds subpoena power is unclear.



Formal Proceedings This third phase is the equivalent of the trial for judicial misconduct. Unlike a civil case in which a plaintiff needs only a good faith basis to file a case or a criminal case in which the People only need probable cause to file a criminal charge, formal proceedings in judicial discipline may only be filed if the charge has already been established by a preponderance of the evidence. Thus, a discipline trial cannot even be scheduled until after the case has been proven by a preponderance of evidence. This process is governed by Part C of the Colo. RJD.

Under Colorado’s Constitution, the Discipline Commission has two choices in pursuing formal proceedings. The Discipline Commission may hold the hearing itself or it may have the hearing held before three special masters who are judges. Colo. Const. Art. VI, §23(3)(e). However, when the Colorado Supreme Court adopted the Rules of Judicial Discipline, it omitted rules to govern formal proceedings held by the Discipline Commission. The rules as designed by the Supreme Court only provide for judges to conduct constitutional formal proceedings.

The charges of misconduct are brought in formal proceedings in the name of the People of Colorado, just like a criminal case. The People are represented by “special counsel” rather than a district attorney. The special counsel is appointed by the Discipline Commission. At the request of the Discipline Commission, the Supreme Court appoints a panel of three special masters to hear the formal proceedings. The rules do not make clear who selects the judges that serve as the special masters. Traditionally, the Supreme Court has selected the judges who will serve as special masters.

The standard of proof at formal proceedings requires the misconduct charges to be proven by “clear and convincing evidence.” If one or more allegations of misconduct are proven, the special masters, if used, enter formal findings and make recommendations to the Discipline Commission for sanction. The special counsel that handled the formal proceedings also makes recommendations to the Discipline Commission for sanction.



Recommendations After formal proceedings, the Discipline Commission receives the record of the proceedings, the findings following trial, the recommendations of the special masters if special masters were used, and the recommendations of the special counsel. The Discipline Commission then reviews these materials and formulates its recommendations for the Colorado Supreme Court. *See* Colo. Const. Art. VI, §23(e).

The Discipline Commission files its recommendations with the Colorado Supreme Court accompanied by the record of the proceedings.

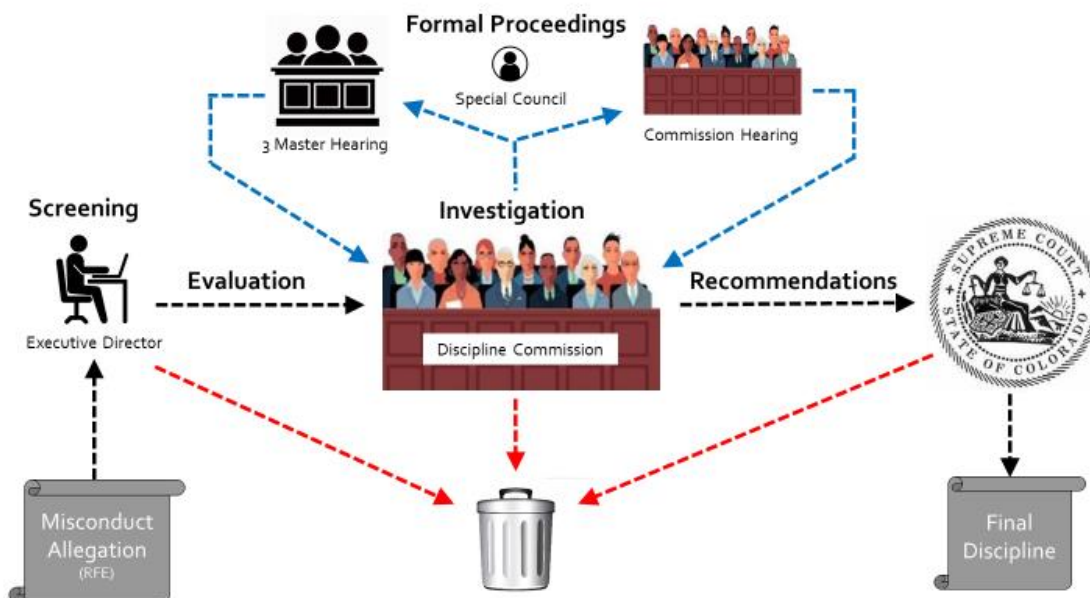
All of the disciplinary proceedings have been confidential under Colorado’s Constitution until this phase. The filing of the recommendations is not ordinarily confidential (though the Supreme Court appears to have the authority to make all or portions of the filings confidential). The filing of the record with the recommendations does not deprive any confidential materials of their confidential status. Therefore, any privileged or confidential materials examined in the disciplinary process retain their confidential or privileged status. *See* Colo. Const. Art. VI,

§23(3)(g). The recently enacted statute also confirms these continuing privilege/confidentiality protections at C.R.S. § 13-5.3-106(6)(e).



Supreme Court Final Decision Proceedings The fifth and final phase of judicial discipline proceedings is held by the Colorado Supreme Court under Colo. RJD 39. The Supreme Court receives the record and recommendations from the Discipline Commission. The Supreme Court may then conduct further proceedings as it deems fit, including gathering more evidence, before making a final decision on discipline, whether it should be imposed and what sanction to impose if any is warranted.

The path of an allegation of judicial misconduct through Colorado's current system of judicial discipline is depicted below.



MEMBERSHIP OF THE DISCIPLINE COMMISSION

The membership of Colorado's Discipline Commission is defined in our Constitution. The commissioners are comprised of 10 uncompensated members. The judiciary holds 4 positions, 2 district court judges and 2 county court judges. These judge members are all appointed by the Chief Justice of the Colorado Supreme Court. Of the remaining positions, 2 are required to be attorneys and 4 are non-attorney citizens. The attorney and lay members of the Discipline Commission are selected by the Governor and confirmed by the Senate. All Commissioners serve on a volunteer basis without compensation (other than necessary reimbursement for travel expenses incurred in performance of the Commissioners' duties).

The current members of the Discipline Commission are as follows:

Judges

Hon. Rachel Fresquez

Hon. Sara Garrido

Hon. Bonnie McLean

Hon. David Prince

Attorneys

Elizabeth Espinosa Krupa

Mindy Sooter

Citizens

Jim Carpenter

Bruce Casias

Yolonda Lyons

Drucilla Pugh

Colorado has followed a tradition of ensuring diversity of perspective and membership on the Discipline Commission. The current membership is 70% female. Of the judge members, 75% are female. Half of the members are racially or ethnically diverse. Only 20% of the members are majority males. This compares to the Colorado population which is evenly divided by gender and is 67% white. This compares to the Colorado judiciary which is 84% white and 59% male.

The special masters that preside over formal proceedings are required to be judges or justices but may include retired judges or justices.

CURRENT CHALLENGES TO COLORADO'S SYSTEM OF JUDICIAL DISCIPLINE

In February of 2021, the press reported allegations that the Colorado Judiciary had suppressed complaints of misconduct against judges. The press reported allegations that the Colorado Judiciary had bought the silence of witnesses to judicial misconduct allegations. The events and revelations that followed have illustrated structural impediments to the Discipline Commission fulfilling its Constitutional mandate.

The challenges facing Colorado's judicial discipline system are not unique to Colorado. Other jurisdictions have faced analogous problems in recent years. A series of articles by Reuters addressed similar issues and can be found at <https://www.reuters.com/investigates/section/usa-judges/>. The federal judiciary of the United States is facing analogous structural challenges. See <https://www.washingtonpost.com/politics/2022/05/16/judges-accused-discrimination-bullying/>. Pennsylvania undertook its own examination of its system of judicial discipline in recent years. See <https://www.pmconline.org/resources/2017-report-recommendations-improving-pennsylvanias-judicial-discipline-system>

Colorado also is not alone in conducting the kind of review this interim committee is undertaking. Montana recently enacted legislation, HJ40, creating an interim committee to study and audit its judicial discipline process. See <https://montanafreepress.org/2021/09/14/montana-republicans-question-judges-about-ethics/>. The NCSC's Center for Judicial Ethics reports that California is also pursuing a process for reviewing its judicial discipline system after an audit found shortcomings. See generally <https://www.courthousenews.com/california-auditor-calls-judicial-misconduct-probes-weak/> (discussing the audit results). And, as the Washington Post article cited above discusses, the U.S. Congress is examining the system of judicial discipline in the federal court system.

While the factual situation bringing these issues to the forefront may be unique to Colorado, the issues and the need to update antiquated systems of judicial discipline are arising to one degree or another in jurisdictions across the country.

This Report will address the impediments to effective judicial discipline illustrated recently in Colorado’s system using the five-phase structure discussed above and then discuss system-wide impediments.



Intake and Screening The Colorado Constitution created a single, multi-perspective, citizen-involved entity to examine allegations of judicial misconduct. That entity is the Discipline Commission. However, the Discipline Commission cannot examine allegations of judicial misconduct that it does not know about. The events of 2021-22 revealed that the Colorado Judiciary has not been disclosing some allegations of serious judicial misconduct.

The Colo. RJD assign to the Discipline Commission the task of screening for merit allegations of judicial misconduct. *See* Colo. RJD 13. The Discipline Commission is tasked with dismissing immediately misconduct allegations that are frivolous or otherwise unsupportable. *See id.* The Colorado Judiciary is not granted screening authority with respect to allegations of judicial misconduct.

In recognition of the Discipline Commission’s screening and examination roles, the Discipline Commission entered a written contract with the Colorado Judiciary dated February 5, 2010. The 2010 agreement is still in effect today. The 2010 agreement requires the Colorado Judiciary to report to the Discipline Commission allegations of judicial misconduct that it receives. If the Colorado Judiciary conducts a “preliminary investigation” of an allegation of judicial misconduct, the 2010 agreement requires it to provide to the Discipline Commission “all” of the “investigatory notes and findings that address the alleged judicial misconduct.” These duties of disclosure attach regardless of the merits of the allegation.

Until 2021, the Discipline Commission believed the Colorado Judiciary was complying with the 2010 agreement and relied on that compliance. Events of 2021-22 have revealed that the Colorado Judiciary has not been complying with the 2010 agreement. The Colorado Judiciary has not disclosed to the Discipline Commission allegations of judicial misconduct as well as the results of their investigations of such allegations in some cases. Nondisclosure of judicial misconduct allegations and nondisclosure of file materials relevant to such allegations represent serious impediments to fulfillment of the Commission’s mandate to examine such allegations for potential merit.

When the Discipline Commission asked the Colorado Judiciary in early 2021 what policies had been adopted to implement the obligations stated in the 2010 agreement, the Colorado Judiciary’s response did not identify any comprehensive implementation efforts. Moreover, the Colorado Judiciary’s responses have indicated that it has entered one or more contracts with third parties that purported to block compliance with the disclosure requirements the Colorado Judiciary defined for itself in the 2010 agreement.

When the Discipline Commission learned that the 2010 contract obligations had not been honored, the Commission made requests for compliance. The Discipline Commission was unable to obtain compliance. The Colorado Judiciary declined to make the affirmative disclosures required by the 2010 agreement and asserted that it would only respond to specific questions. When the Discipline Commission posed those specific questions, the Colorado Judiciary would answer some but not others. The Colorado Judiciary would provide only limited information and few if any supporting documents. In one example, the Colorado Judiciary

declined for several months even to identify the judge that was the subject of a publicly reported allegation of misconduct, also declining for nearly one year to identify the critical witnesses to the events at issue.

Faced with these challenges, the Discipline Commission concluded that it had no immediately available and practical means of enforcing the contractual disclosure obligations.

Newly enacted C.R.S. §13-5.3-106 addresses this impediment of nondisclosure by codifying the Colorado Judiciary's duty to disclose allegations of judicial misconduct to the Discipline Commission. **However**, the statute does not identify an enforcement mechanism in the event non-compliance is discovered. Thus, the practical situation may not have materially changed from 2021.



Complaint Investigation As noted above, in this phase the Discipline Commission acts like a grand jury, investigating and gathering information. The Discipline Commission has been reliant on the Colorado Judiciary's cooperation in providing it with access to file materials, personnel, and resources to conduct these investigations. The events of 2021-22 revealed that this access to information and resources is dependent on the level of cooperation provided by leadership of the Colorado Judiciary.

Resourcing Investigations

In the past, the Discipline Commission has been primarily reliant on personnel loaned by the Colorado Judiciary (specifically, the Supreme Court's Office of Attorney Regulation Counsel) to conduct these investigations. In 2021-22, the leadership of the Colorado Judiciary acted to impede the Discipline Commission's access to conflict-free personnel and resources. The leadership asserted the authority to control the scope of the Discipline Commission's investigatory assignments to special counsel and the authority to control the Discipline Commission's retention of special counsel.

The leadership of the Colorado Judiciary also asserted the authority to block funding for investigatory special counsel. The Discipline Commission's primary objection to this asserted authority was that any financial oversight should be through a conflict-free decision-maker. The Discipline Commission did not, and does not, object to oversight of its finances but objected to having that financial oversight exercised by those involved in the conduct to be examined.

Additionally, the leadership of the Colorado Judiciary asserted that a number of unwritten and evolving rules would be used to limit and constrain the financing of the investigation at issue. The Discipline Commission objected strongly to use of unwritten and undisclosed "rules" to constrain an ongoing investigation. Again, these were asserted to provide control of the investigative resources to conflicted individuals and even individuals that had asserted publicly that they had disqualified themselves from participation in the relevant matters.

Newly enacted C.R.S. §§13-5.3-102 through 104 address these personnel and resource control impediments by codifying the Discipline Commission's prior authority to determine the scope of special counsel engagements, providing conflict-free funding to the Commission, and authorizing the Discipline Commission to hire its own personnel to conduct investigations.

Accessing Information/Evidence

A critical part of the complaint investigation phase is the Discipline Commission's ability to access information and files held by the Colorado Judiciary. A large portion of the misconduct allegations investigated by the Discipline Commission involve facts and evidence held by the Colorado Judiciary. Upon request, the Discipline Commission enjoyed open and free access to relevant files and information held by the Colorado Judiciary until 2021. In the past, the Discipline Commission received this open access upon request in hundreds of examinations conducted in recent years. As indicated, this open access to judicial records is consistent with the parties' 2010 agreement.

In 2021, the leadership of the Colorado Judiciary ended this open access to its records for some, but not all, discipline investigations. As discussed in relation to the screening phase, the Discipline Commission did not receive information and files when requested on some, but not all, misconduct allegations. Access to information and file materials has continued unimpeded on some analogous misconduct allegations. This open access has continued for those cases that do not involve examining the conduct of individuals that also play a role in deciding how much information access will be permitted.

This inconsistency of information access itself illustrates a critical problem in the structure of judicial discipline. If information access is not reliable and predictable but, instead, is subject to subjective standards and decision-making involving those whose conduct is at issue, the investigatory system is neither effective nor credible.

As noted above, the newly enacted statute codifies a duty of disclosure owed by the Colorado Judiciary relating to allegations of judicial misconduct. The duty as stated is uniform in application to misconduct allegations made as to all Colorado judges regardless of position or stature. But, as also noted, no enforcement mechanism has yet been defined.

Subpoena Power

Prior to 2021, the Discipline Commission enjoyed a remarkably high level of cooperation and candor in its affirmative information gathering efforts. In the Discipline Commission's current institutional memory, it had not had a judge being investigated or third party record holder decline a request for information. As noted, this changed in 2021 for a small category of matters. An essential tool for an investigative agency is the subpoena power, the power to compel production of evidence when the evidence is not forthcoming on a voluntary basis. The events of 2021 required the Discipline Commission to exercise subpoena power for the first time that can be identified in its history.

Under Colo. RJD 22, the Discipline Commission is granted subpoena power. However, the rules do not provide a clear conflict free enforcement mechanism, particularly in the circumstance where the leadership of the Colorado Judiciary would be the defendant in an enforcement action—either as a party being investigated or the party declining to comply with the subpoena.

In 2021, the attorneys for the Colorado Judiciary took the position that the Discipline Commission has no subpoena authority in the investigation phase of judicial discipline. The Colorado Judiciary further took the position that any dispute over the subpoena power would be addressed in an original proceeding held before the Colorado Supreme Court, the ultimate administrative decision-makers that originally invited, and later objected to, the subpoena that

would be at issue. The Colorado Judiciary later expanded this asserted limitation of the subpoena power to all investigations of judicial misconduct.

Recommendation: The Discipline Commission recommends that the General Assembly codify a subpoena power commensurate with other investigative entities and grand juries. A conflict free enforcement mechanism should also be established.



Formal Proceedings **Rulemaking Authority.** The formal proceedings phase illustrates a structural problem that exists system wide for judicial discipline in Colorado, rulemaking authority. The Colorado Constitution grants the Discipline Commission the discretionary authority to select between two mechanisms for formal proceedings, the Commission may hold the hearing itself or may have three special masters appointed to hold the hearing. The Colorado Rules of Judicial Discipline adopted by the Colorado Supreme Court, however, make no provision for hearings before the Discipline Commission itself and appear to purport to eliminate this constitutional option. *See* Colo. RJD 18.5(a) (phrasing use of special masters appointed by the Supreme Court as “shall” for this constitutionally optional mechanism of pursuing formal proceedings creating, at a minimum, ambiguity).

According to the NCSC’s Center for Judicial Ethics, 20 jurisdictions in the United States place rulemaking authority with the entity that handles judicial ethics oversight, known in Colorado as the Discipline Commission. An analogous entity in Colorado, the Commissions on Judicial Performance hold rulemaking authority for their proceedings.

Under the Colorado Constitution, the Colorado Supreme Court is granted the authority to adopt rules for judicial discipline proceedings. The events of 2021 illustrated the problems that result when a conflicted entity holds rulemaking authority over the process for accountability and holds the authority to interpret those rules.

One of the challenges the Discipline Commission encountered with the current rulemaking system is a willingness by leadership of the Colorado Judiciary to set aside rules as written, presumably because of their authority to change or re-interpret those rules. For example, Colo. RJD 2(aa) unequivocally grants the Discipline Commission the authority to determine the scope of assignments given to its special counsel. However, the leadership of the Colorado Judiciary asserted in 2021-22 that it held the authority to determine the scope of special counsel assignments on certain matters. Additionally, Colo. RJD 3(d) gives the Executive Director (with oversight by the Discipline Commission) the authority to determine the Commission’s budget and administer the funds. However, leadership of the Colorado Judiciary persistently asserted in 2021-22 that unwritten rules restrict and override this written grant of budget authority, at least in relation to certain investigations.

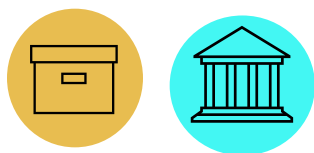
Recommendation: The Discipline Commission recommends that the example of the Colorado Commissions on Judicial Performance and 20 other states be followed and rulemaking authority be placed with the Discipline Commission. This will require amendment of Art. VI, §23(3)(h) of the Colorado Constitution.

Special Masters

All formal proceedings to date have been conducted through the panel of three special masters process. The special masters are required to be judges. The special masters are currently selected on an ad hoc bases when needed. As a result, special masters are unlikely to have experience with or be familiar with the unique discipline procedures and decisional standards.

Recommendation: The Discipline Commission recommends that a small pool of potential special masters, such as six, be established. When an individual panel is needed, the appointment would then be made from this pool, selecting conflict free special masters that are available on the short timelines contemplated under the Colo. RJD. The potential special masters would serve for a minimum number of years and would gain expertise in the proceedings and the decisional standards. This could be accomplished by rulemaking authority rather than by statute.

Similarly, the Discipline Commission recommends that the four-year terms of commission members be extended to provide for greater institutional knowledge and greater insulation from political influence. For example, district court judges serve six-year terms while appellate judges serve ten-year terms for these same reasons. Members of the nominating commissions serve six-year terms. The terms of commission members should be extended to a similar range, maintaining staggered terms. The length of the membership terms is set in the Constitution and, therefore, an amendment to the Constitution would be required to implement this reform.



Recommendations and Final Decision Phases Among the significant impediments to credible judicial discipline illustrated by the events of 2021-22 is that Colorado’s Constitution fails to provide for the functioning of a system when the members of the Colorado Supreme Court have conflicts that would ordinarily prevent their handling of a matter under the Colorado Code of Judicial Conduct (the “Code”).

Conflicted Final Decision-Maker

Personal Involvement or Decisional Conflicts

As noted, under the current judicial discipline system in Colorado, the Colorado Supreme Court makes the final decisions on serious judicial discipline cases. The Constitution and the Colo. RJD require an individual justice to recuse on a discipline case involving the justice’s own possible sanction. *See* Art. VI, §23(3)(h); Colo. RJD 9. However, in 2021, allegations of misconduct arose that involved conduct of the Supreme Court as a whole, actions taken involving the Court as a whole such that all of its members are important factual witnesses. Those allegations also involved allegations of individual misconduct instances involving more than one member of the Court. These are, of course, merely allegations and the current discussion is not addressing whether the allegations have merit but, rather, a credible system for examining the potential merit of those allegations.

Additionally, after the allegations of misconduct became public, the Supreme Court then took collective actions in public⁹ that would ordinarily raise questions of whether the justices would need to recuse under the Code on a related judicial discipline case.¹⁰

As the public statements of the Supreme Court raise disqualification issues for the justices as a whole and the current system makes no provision for functioning when the final discipline decision-maker has conflicts, the ability of the current system design to function on the conflict matters is in doubt. More importantly, the system lacks credibility with the public.

Administrative Conflicts

Judicial officers in leadership positions within the judiciary have more extensive administrative roles than the public generally understands. Justices of the Supreme Court act much like chief executives and a board of directors for a 4,000 personnel entity with an annual budget of over half a billion dollars. The Colorado Supreme Court has announced in the past that administrative leadership duties for the Judicial Department are handled by the justices as a whole (some collectively and some by portfolio assignment) rather than delegating all these responsibilities to the Chief Justice alone. See <https://www.denverpost.com/2020/12/07/audit-colorado-supreme-court-administrators-office/>; and see, e.g., www.denverpost.com/2019/07/18/colorado-judicial-department-resignation/ (combining decisional conflicts with administrative conflicts, a Court spokesman was quoted as explaining that all of the justices approved the Masias contract at the center of the 2021 allegations of misconduct). Thus, in addition to their roles as judges, the justices are at the head of the corporate chain of command in the judiciary. Most cases involving serious judicial misconduct come before the justices in a corporate administrative or managerial role long before a judicial discipline case can progress to being filed in the Supreme Court. They may be handling the matters as personnel matters, as docket coverage issues, as loss prevention matters, as contracting matters, or a myriad of other managerial roles. At times, the justices become personally involved in trying to manage the purely administrative or corporate side of a situation that later develops into a discipline proceeding against another judge.

As a result, in most judicial discipline cases involving serious potential sanction, one or all of the justices has been involved to some degree and has direct knowledge of facts or ex parte exposure to facts or evidence that will be part of the discipline case. Under Rule 2.11 of the Code, such firsthand knowledge and/or ex parte exposure to evidence would ordinarily require a judge to be disqualified from handling a related case.

As administrative leaders of the Colorado Judiciary, the justices of the Supreme Court must also protect the Judiciary from financial liability and otherwise protect the system-wide interests of the Judiciary. This creates potential conflicts of interest if the justices are also involved in judicial discipline matters because the financial or other interests of the Judiciary may conflict with the interests of judicial discipline. The justices can be put in the position of having to decide whether to put ethics or dollars first. For example, when the Chief Justice stated to the Joint Judiciary Committee SMART hearing that the Judiciary was providing investigators with full access to files and information, the Chief Justice also indicated that a reason for withholding

⁹ This report does not attempt to discuss any alleged conduct other than the public actions taken by the justices.

¹⁰ See Code Rules 2.9, 2.10, and 2.11 and, by way of examples, the public statements issued by the Colorado Supreme Court on February 4, 2021, February 8, 2021, February 16, 2021, January 25, 2022, and February 7, 2022.

files and information by noting that sharing had to be limited to avoid “subject[ing] the branch ... to financial liability.”

In oral communications, non-judge leaders with the Colorado Judiciary have also asserted that concerns about the risks of incurring financial liability were driving part of the decisions to withhold files/information. In the fall of 2021, a leader in the Colorado Judiciary asserted that the work of the Discipline Commission’s special counsel had to be limited in order to protect the Colorado Judiciary from potential financial exposure to a civil claim for damages.

For these reasons, a judicial discipline model that designates the Supreme Court as the final decision-maker in discipline cases raises far more conflict situations than just those involving a justice acting as a judge and ruling on their own conduct or decisions. The conflict situations are inherent in such a system design given the administrative or corporate roles of the justices of the Colorado Supreme Court.

Recommendation: Colorado’s discipline system should be revised to provide for a conflict free final decision-maker on serious discipline cases. Several options are available to address this issue.

Under the process adopted in Pennsylvania, a “pro tem” supreme court is created to handle the discipline case if a member of the state’s supreme court is the responding judge. However, this system requires the creation of an entirely new court when such a situation arises, and the members of the “pro tem” court have no institutional knowledge or history. It also does not, as adopted in Pennsylvania, address the administrative conflicts discussed above that arise in Colorado’s approach to assigning corporate roles to the justices.

Given the scope of Rule 2.11 disqualifications that arise for members of Colorado’s Supreme Court, another option is simply to change the final decision maker rather than creating a “back up” process that only applies when misconduct allegations are made directly against one or more justices. The new final decision-making body for all discipline cases would be changed from the Supreme Court to a multi-perspective board that includes representatives of the judiciary, the bar, and the citizenry that minimizes the risk of conflict issues arising that would incapacitate the decision-maker as a whole. The general structure of Colorado’s existing system could be maintained with just the final decision-making body being reformed consistent with other judicial oversight entities in Colorado.

Given the impediments raised in 2021-22 by interested parties, the power to appoint the judicial members of the board should be diversified. Membership should be comprised of judges representing the appellate judges as a whole, the district court judges, and the county court judges. Each of these categories of judges should, as a whole, select from among their members the individual(s) to serve on the final decision-making board.

One member of the board should be selected by the Discipline Commission. This member could come from any of the three main categories (bench, bar, citizen) but would be required to be a former member of the Discipline Commission. Because the Discipline Commission itself handles, by far, the most judicial discipline matters, this position will provide subject matter expertise and experience to the final decision-making entity as a whole. The person would not be permitted to sit on a matter if they had also seen the matter while a member of the Commission.

Consistent with due process, a final decision on discipline would still be subject to review by the courts (ultimately, a review by the Supreme Court) consistent with the standards found in C.R.C.P. 106 that apply when any other governmental body makes a decision.

The Colorado Constitution designates the Supreme Court as the final decision-maker in judicial discipline cases. Changing this structure will require an amendment to the Colorado Constitution.

An alternative to amending the Colorado constitution would be to exercise the General Assembly's authority to enact a statute establishing a procedure on public policy grounds that provides for the recommendations of the Discipline Commission to become final unless overturned by a conflict free majority of the Colorado Supreme Court (which would be four justices). This solution would not be ideal and should be considered primarily if amending the Constitution is unavailable or unsuccessful.

Disqualification Standards

The rules for disqualification of decision-makers in the judicial discipline process are spotty, ambiguous, and inconsistent. For some decision-makers, such as the justice of the Colorado Supreme Court, substantial ambiguity exists as to what rules of disqualification are accepted as applicable.

In 2021, the Colorado Supreme Court exercised its rulemaking authority to amend the Colo. RJD and adopt a new Colo. RJD 3.5. Rule 3.5 stems from a proposal made to the Supreme Court by the Discipline Commission in June of 2019 but rejected by the Supreme Court at the time. The Supreme Court later made material changes to the proposal and adopted the revised version in late 2021 without prior notice to or consultation with the Discipline Commission. When the Discipline Commission asked for the opportunity to provide input on the new rule, the Chief Justice advised in writing that "Feedback is not necessary."

As indicated above, the public allegations of judicial misconduct and allegations that these claims were suppressed by judicial leadership raised a number of serious disqualification issues for the Colorado Supreme Court regarding its roles in judicial discipline. The Supreme Court responded to these issues by enacting the 2021 amendments that created extensive disqualification rules, but rules applicable solely to ***Discipline Commission members***. The new disqualification rules do not purport to apply to the other critical decision-makers in the discipline process such as the justices of the Supreme Court or special masters. This has exacerbated rather than ameliorated the uncertainty in addressing conflicts of interest in judicial discipline.

Additionally, the meaning of disqualifying oneself from a judicial discipline matter has been inconsistently defined. Under the new Rule 3.5, a disqualified member of the Discipline Commission must have "no involvement in any aspect of the proceedings after the date of recusal." This is a reasonable and appropriate standard and the Discipline Commission has complied with this standard. However, the Commission's experience is that other participants in the judicial discipline process from the Colorado Judiciary have declared a recusal but asserted a right to maintain active involvement in the proceedings at a substantive administrative level. The meaning of disqualification or recusal should be uniform for all those involved in judicial discipline matters.

Recommendation: The Discipline Commission recommends that the General Assembly set uniform, transparent, and reliable standards for disqualification of decision-makers in the judicial discipline system. The General Assembly has the authority to effect this change by statute. *People v. Prophet*, 42 P.3d 61, 62 (Colo. App. 2001); *People v. Bobian*, 626 P.2d 1132, 1134-35 (Colo. 1981).

The Discipline Commission recommends the decision-makers in judicial discipline be defined as the members of the Commission, the members of the final decision-making body (whatever form may finally be chosen), and the special masters. The standards should be set as the same standards that govern judge disqualification in cases as stated in the Code, primarily at Rule 2.11.

System Wide Reform

Transparency

All judicial discipline systems in the United States recognize that allegations of judicial misconduct should be confidential during the initial screening process. The variation among states is defining *when* judicial discipline proceedings become public to allow for transparency and oversight. In Colorado, we draw this borderline between the confidential and public proceedings at the conclusion of the formal proceedings--the trial. This is relatively late in the process as compared to other jurisdictions. An issue for the Interim Committee is whether this borderline should remain as it is or be altered by constitutional amendment. This requires a careful balancing of competing policies in the context of the unique needs of Coloradoans.

As the Center for Judicial Ethics explains,

Confidentiality of complaints

In all states, commission proceedings are confidential at the initial stages after an individual files a complaint against a judge, and a commission cannot confirm or deny that a complaint has been filed against a judge, is being investigated, or has been dismissed, unless an exception applies. Confidentiality at this stage is intended:

- To encourage complainants to come forward without fear that the judge will learn and retaliate,
- To encourage witnesses to cooperate without fear that the judge will learn and retaliate,
- To reassure participants that the media or others will not contact them,

- To allow a commission to encourage infirm or incompetent judges to resign before charges become public,
- To allow a commission to warn a judge about minor misconduct without publicity, and
- To protect a judge's reputation from unexamined allegations that may prove baseless.

Handbook for Member of Judicial Conduct Commissions at 14-15.

As to where the borderline is drawn, the Center goes on to explain as follows:

Confidentiality after formal charges; public hearings

A table showing when confidentiality ceases in formal judicial discipline proceedings in each state is available on the [**Center for Judicial Ethics website**](#).

In the majority of states (35), when formal charges are filed, confidentiality ceases, the charges and the judge's answer are public, and the subsequent hearing on the charges is also open to the public.

- ♦ In 26 states, confidentiality ceases after formal charges are filed.
- ♦ In seven states, confidentiality ceases when the judge files an answer to the complaint or when the time for filing an answer has passed.
- ♦ In two states (Oregon and Rhode Island), confidentiality ceases at the beginning of the fact-finding hearing. The rule for the Oregon Commission on Judicial Fitness and Disabilities provides that the Commission shall issue "a public notice of the hearing not less than 14 days prior to the date of the hearing."

Id. at 27-28.

The Discipline Commission has experienced advantages and disadvantages of the confidentiality borderline currently governing in Colorado. The Discipline Commission defers to the General Assembly on whether that borderline should be adjusted in Colorado but will be happy to discuss the options and relative merits as the Interim Committee may choose.

An Insulated and Conflict-Free Funding Source

For the last decade and a half and pursuant to an agreement between the Disciplinary Commission and the Judiciary, the Disciplinary Commission's operating expenses have been funded through attorney registration fees. The Disciplinary Commission's investigators and

attorneys have also been provided through the Colorado Supreme Court's Office of Attorney Regulation Counsel. These funding mechanisms were formalized through amendments to C.R.C.P. 227.

Starting in 2021, problems arose that prevented the Disciplinary Commission from accessing funding and resources to pursue investigations. The system proved to have insoluble conflicts. Through SB22-201, these immediate challenges were overcome by providing for direct funding of the judicial discipline system with General Fund monies.

The prior funding mechanism using a specified, fee-based funding source under C.R.C.P. 227 had certain advantages of being politically/economically insulated as well as scalable to variable disciplinary needs. Funding through attorney registration fees was also consistent with provision in Colo. Const. Art. VI, § 23(3)(c) that the Commission's expenses were "to be paid by the supreme court from its budget to be appropriated by the general assembly."

Under the new system of using General Fund monies, judicial discipline is left vulnerable to adverse economic conditions and changes in the political landscape. To serve in its appropriate independent and non-partisan role, the Interim Committee should consider whether Colorado's discipline system should be funded through an insulated and non-discretionary funding source.

Recommendation: The Discipline Commission's core operations should be funded through an economically insulated, non-discretionary funding source. One possibility for such a funding source includes the direct appropriation of attorney registration fees by the Legislature, consistent with the authority provided through Colo. Const. Art. VI, § 23(3)(c) or new authority defined through a potential constitutional amendment. Another possibility is the use of designated filing and other court fees, similar to the funding model for the Colorado Commissions on Judicial Performance. *See* § 13-5.5-115, C.R.S. (creating State Commission on Judicial Performance Cash Fund through revenue generated by criminal and traffic case docketing fees).

SUMMARY OF RECOMMENDATIONS

- **Subpoena Authority:** Codify subpoena authority for the Discipline Commission to investigate judicial misconduct allegations akin to other investigative bodies and grand juries.
- **Disclosure/Discovery Enforcement Mechanism:** Codify a conflict free mechanism for addressing disputes with the Colorado Judiciary over claims of privilege or confidentiality as well as compliance with the statutory duties to document and disclose complaints of judicial misconduct.
- **Rulemaking Authority:** Grant the Discipline Commission rulemaking authority over judicial discipline on the model of the Colorado Commissions on Judicial Performance.
- **Special Masters:** By rule or statute, create a continuing pool of judges that are qualified to act as special masters in judicial discipline matters to foster institutional expertise.
- **Commission Member Terms:** Extend the current four year terms of Commission members to provide greater subject matter expertise and greater insulation for political influence. For similar reasons, District Court Judges serve six year terms and appellate judges serve ten year terms.
- **Conflict Free Final Decision Makers:** Maintain the current two-tier judicial discipline system but change the final decision-maker to a conflict free, multi-perspective, citizen involved entity with representatives from the bench, bar, and citizenry. Address appointment power and term lengths to assure insulation from undue influences.
- **Disqualification Standards:** Codify clear, uniform, and consistent disqualification standards for all decision-makers involved in judicial discipline. Apply same standards that have been previously established for judge disqualification and define meaning of disqualification.
- **Transparency:** Evaluate the policy considerations and determine whether the border between confidentiality and transparency in Colorado's judicial discipline system should be altered.
- **Funding:** Evaluate the viability of funding the judicial discipline system through a source that is insulated from politics and variations in the economy consistent with the model used for the Colorado Commissions on Judicial Performance.